

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NORMA DUVALL

Claimant

VS.

O'REILLY AUTO PARTS

Respondent

AND

UNIVERSAL UNDERWRITERS INS. CO.

AND AMERICAN CASUALTY COMPANY

OF READING PENNSYLVANIA

Insurance Carrier

Docket No. 1,003,495

ORDER

Respondent and its insurance carriers requested review of the November 12, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on April 27, 2004.

APPEARANCES

James R. Roth, of Wichita, Kansas, appeared for the claimant. Clinton D. Collier, of Kansas City, Missouri, appeared for respondent and its insurance carriers.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument respondent conceded it has no objection to the 17.5 percent permanent partial impairment awarded by the ALJ as a result of the May 31, 2000 accident.

ISSUES

The ALJ found claimant sustained two separate injuries on two separate and distinct dates. Accordingly, he awarded two separate functional impairments, the first being a 17.5 percent permanent impairment to the shoulder, and the second being 15 percent to the body as a whole for a cervical impairment. The ALJ further found claimant's average weekly wage to be \$614 (May 31, 2000 accident) and \$634 (June 5, 2001 accident) based upon a printout provided by respondent.

At oral argument both parties agreed the primary issue for determination in this appeal is the whether claimant sustained an injury to her neck in the either accident, and if so, the nature and extent of her resulting impairment.

Respondent contends it is responsible for only the permanency related to claimant's shoulder condition and that claimant's neck complaints are not attributable to her work activities in either accident. Alternatively, respondent suggests that, at best, claimant suffers from a 5 percent permanent partial impairment to the body as a whole for aggravation of her neck complaints arising out of the May 31, 2000 accident only. In addition, the respondent alleges the ALJ erroneously calculated the average weekly wage, dividing the gross wages by 13 weeks rather than 14 weeks and that the Board should modify the Award to reflect a correct (lower) average weekly wage of \$571.05.

Claimant argues that the ALJ's award should be affirmed in all respects. Claimant is entitled to compensation for both her shoulder and neck injuries, both arising out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a parts specialist, waiting on customers who want to purchase auto parts. She began her employment with respondent in September of 1997 and continued until January 25, 1999, when she left for a year. On January 25, 2000, claimant returned to the same position with respondent and continued in that job up to the time of the regular hearing.

On May 31, 2000, the claimant was stacking battery cores on a dolly. As she turned, she felt a pop in her left shoulder with pain going up in to her neck.¹ She was

¹ R.H. Trans. at 12-13.

referred to Dr. Kenneth Johnson for treatment. Dr. Johnson indicated claimant voiced no neck or back complaints during his examination and he found her cervical area to be normal. He provided her with an injection to the shoulder in the hopes of minimizing her pain. On the second visit he again checked her cervical area and found “[m]ild limitation of motion and positive Spurling’s to the left.”² The Spurling’s test is done to check for nerve irritation in the cervical spine.³ When deposed, Dr. Johnson made it clear that claimant was not making complaints regarding her cervical spine. Rather, he was merely doing a thorough examination and attempting to rule out the cervical spine as the source of her pain. He ordered an MRI to the shoulder and an EMG of the left upper extremity and cervical paraspinals. The EMG disclosed a “mild left C6 radiculopathy, subacute”.⁴ He also ordered x-rays which showed degenerative changes at C4-5, C5-6 on the left and C3-4 on the right. Based upon these test results, Dr. Johnson testified that claimant had two processes at work on her body. One involved the shoulder and the other was degenerative in nature within her cervical spine.

When conservative treatment efforts failed, surgery was performed by Dr. John Yost to repair her partially torn rotator cuff and perform a clavicle excision. After a short period off work, claimant returned but her left arm was in a sling. During this period, claimant testified her neck became symptomatic. She testified that as she worked with her right arm, she would reach to grab things up over shoulder level and this maneuver would hurt her neck.⁵ All told, claimant indicated she worked 112 days with her left arm in a sling and that this “aggravated the neck.”⁶

Claimant then testified to another accident occurring on June 5, 2001 when she was pulling an air conditioner compressor down from a shelf. As she pulled it down with her right hand she had to support it with her left. At that point, her “shoulder popped and my neck started hurting, also, from the procedure that I was doing.”⁷ Although there is apparently no dispute that this incident occurred,⁸ there is little indication in the medical records that claimant relayed this second event to any of the medical practitioners. Her

² Johnson Depo. at 7.

³ *Id.*

⁴ *Id.* at 12.

⁵ R.H. Trans. at 35-36.

⁶ *Id.* at 24-25.

⁷ *Id.* at 16.

⁸ At the regular hearing respondent admitted claimant met with personal injury by accident on the dates alleged. R.H. Trans. at 3. Claimant was alleging May 31, 2000 and a series of injuries culminating on June 5, 2001.

private health care provider seemed to recollect the event as he had been treating her on a fairly regular basis but there was no indication within his records that she told him of this second accident.⁹

She continued treatment while working. On August 16, 2001, claimant again saw Dr. Johnson and complained of anterior shoulder pain as well as numbness down her arm. According to Dr. Johnson, these complaints are consistent with a left C6 radiculopathy.¹⁰ By October 2001, Dr. Johnson was treating solely her neck complaints and offered her injections. When those did not prove helpful, she was released at maximum medical improvement on November 15, 2001.

Dr. Johnson issued a written opinion indicating that he believed that claimant's cervical complaints are more likely related to "chronic findings" and that she bears no permanent partial impairment related to the cervical spine.¹¹

Claimant was also evaluated by Dr. Mark Melhorn, an orthopaedic surgeon, for purposes of providing an impairment rating. He saw claimant on December 4, 2001, and at that time he testified claimant's physical complaints centered mostly on the top of her shoulder. While claimant did voice some neck complaints Dr. Melhorn could find no objective findings relative to her cervical area. In fact, he found her pain complaints wholly unexplainable.¹² He ultimately assigned a 14 percent impairment to the shoulder under the 4th edition of the *Guides* for her May 31, 2000 accidental injury.¹³

When cross examined, Dr. Melhorn was asked whether claimant's positive EMG results, which suggested C6 radiculopathy would alter his opinions in any way. He testified that an EMG is not foolproof. When asked whether work had played any part in claimant's current neck complaints, he explained as follows:

My conclusion would be that the work activities represent a greater contribution or aggravation. Again, the condition itself is probably an inherited age-related specific component for this individual, however, if her physical activities at work are greater than those outside the work environment and physical activities represent an

⁹ Haag Depo. at 10 and 32.

¹⁰ Johnson Depo. at 22.

¹¹ *Id.*, Ex. 2.

¹² Melhorn Depo. at 10.

¹³ *Id.* at 10-11; American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

aggravation to that pre-existing condition, then her work activities would represent a greater component with regard to those aggravations.¹⁴

In any event, Dr. Melhorn indicated he conducted a thorough and adequate assessment of claimant's shoulder and neck, and although claimant may well have some sort of nerve root irritation, he does not believe, to a reasonable degree of medical certainty, that work is the cause of that condition.¹⁵

Claimant was also examined by Dr. Pedro A. Murati on June 20, 2002. Dr. Murati reviewed claimant's medical history and performed his examination. He concluded claimant sustained a 21 percent permanent partial impairment to the shoulder along with a 15 percent permanent partial impairment to the cervical spine. The 15 percent to the spine is based upon cervical radiculopathy and is consistent with a category DRE III finding. When combined, this yields a 26 percent to the body as a whole.

Dr. Murati testified that it was his belief that all of this permanent impairment was attributable to claimant's May 31, 2000 accident, although he conceded the neck pain came some 1-1/2 months after the initial injury. Nonetheless, he believed all of her impairment was related to the 2000 accident rather than to the subsequent June 5, 2001 event. In fact, he appeared not to have been told about the accident involving the air conditioner.

After considering all this testimony and medical evidence, the ALJ concluded that, in addition to the 17.5 percent to the shoulder, claimant sustained an additional 15 percent permanent partial general disability as a result of an accident that occurred June 5, 2001. The ALJ was persuaded by Dr. Melhorn's explanation that claimant's work activities had exacerbated and accelerated the underlying degenerative condition in her cervical spine. Thus, he awarded claimant 15 percent permanent impairment to the whole body, based upon the opinions of Dr. Murati, the only physician who rated the cervical impairment.

The Board has considered the record as a whole and finds the ALJ's Award should be modified. Based upon the claimant's testimony, it appears that the more reasoned approach is to find that claimant sustained a series of injuries to her neck which aggravated her preexisting degenerative condition commencing after her initial injury in May of 2000 and culminating in an acute injury on June 5, 2001. Claimant's testimony as to the onset of neck complaints as a result of wearing a sling and continuing to work are uncontroverted and support the Board's view. Claimant may well have injured her neck on May 31, 2000, but it is clear that wearing the sling on her left arm affected her neck. For this reason, the

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 27.

Board affirms the ALJ's findings, although modifying the Award to reflect a series of injuries culminating on June 5, 2001.

As for the dispute over the average weekly wage, the Board has reviewed the wage statement and finds it encompasses a period of 13 full weeks and 5 working days. This translates to 14 work weeks. Thus, the ALJ erroneously determined the wage statement covered a period of 13. For this reason, the average weekly wage must be recalculated consistent with the principles set forth in K.S.A. 44-511. The Board finds claimant's average weekly wage for the May 31, 2000 accident should be \$571.05 which yields a compensation rate of \$380.72. As for the June 5, 2001 injury, claimant testified she received a raise of 50 cents an hour, thereby increasing her average weekly wage by \$20 per week and that she continued to work approximately the same amount of overtime. This would translate to an average weekly wage of \$591.05 and a compensation rate of \$394.05. The Board hereby modifies the ALJ's Award to reflect the correct average weekly wage calculations set forth herein.

All other findings are affirmed to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated November 12, 2003, is affirmed in part and modified in part as follows:

Left Shoulder Injury May 31, 2000

The claimant is entitled to .57 weeks of temporary total disability at the rate of \$380.72 per week in the amount of \$217.01 followed by 39.28 weeks, at the rate of \$380.72 per week, in the amount of \$14,954.68 for a 17.5 percent loss of use of the shoulder, making a total award of \$15,171.69.

Neck Injury Series Ending June 5, 2001

The claimant is entitled to 62.25 weeks of permanent partial disability compensation at the rate of \$394.05 per week or \$24,529.61 for a 15% functional disability, making a total award of \$24,529.61.

As of April 27, 2004 there would be due and owing to the claimant permanent partial disability compensation at the rate of \$394.05 per week in the sum of \$24,529.61 for a total due and owing of \$24,529.61, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carriers
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director